



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 47 OF 2011

In the matter of the Estate of MZEE OMARI (Deceased)

ABDALLA MUTEMBEI GISAGA.....APPLICANT

VERSUS

PAMELA GACHERI PATRISIO.....1ST RESPONDENT
CRISUS MICHENI NDEKE (MWALIMU).....2ND RESPONDENT
NYAGA ISMAEL (SMATEX).....3RD RESPONDENT
JOSEPH MURITHI (MUEMBU).....4TH RESPONDENT
NJAGI NTIBA (CHIBU).....5TH RESPONDENT
PATRICK MBAKA NJERU.....6TH RESPONDENT

R U L I N G

The application before court is dated 26/9/2014 seeking for orders that the respondents be restrained from inter-meddling, committing waste and or entering Plot No. 759/11 Ndagani, Plot No. 053/053 (market stall) Chuka, Plot No. 054/054 (market stall) Chuka, KARINGANI/NDAGANI/763, KARINGANI/NDAGANI/716 and MWANJATI/MARIANI/4779 pending hearing and determination of this case. The applications is grounded on the fact that the respondents are strangers to the estate of the deceased and have to right to be there and that the respondents invaded the estate of the deceased without the consent of other family members and continue to waste it.

The 1st Respondent in her replying affidavit sworn on behalf of the 2nd to 6th respondent state that she was the wife of the deceased's late son and that the property mentioned by the applicant was distributed to the respondent in Succession cause No. 94 of 1992 (information contained in the court record). She further states that the respondents have the consent of the administrator of the estate to occupy the plots mentioned above. She further states that the all the respondents are engaged in the development of the said plots.

The administrator of the estate also swore a replying affidavit stating that the grant of letter of administration was confirmed on 19/5/1993 and that about 21 years have lapsed since the issuance of the confirmed grant and the application for revocation of grant dated 21/5/2014.

The 6th respondent in his replying affidavit states that he bought 2 acres out of parcel land number

KARINGANI/NDAGANI/716 from the deceased's wife Mariam Karimi and the deceased's son Omari Kamundi who are both beneficiaries of the deceased estate. On 3/4/1993. He stated that the said parcel of land was charged by Kenya Commercial Bank and that it was agreed that the 6th respondent would take over repayment of the loan to the bank and eventually redeem the said parcel of land from the being auctioned by the bank. After clearing the outstanding bank loan, he was given vacant possession of the two acres out of KARINGANI/NDAGANI/716 in 1997. He stated that Mariam Karimi and Omari Kamundi were the beneficiaries of KARINGANI/NDAGANI/716 according to the certificate of confirmation of grant issued on 13/4/1994. The 6th respondent further states that he has been in occupation of the two acres since 1997 and has fully developed the same as it is legally his. He states that a restraining order will cause him to suffer irreparably.

During the oral submissions of the application dated 26/9/2014, the applicant stated that he is the deceased's son and that his mother was the deceased's second wife. He states that the respondents should be evicted from the mentioned properties as they were unfairly benefiting from the same especially because they are strangers to the estate. He states that the administrator is his step brother and that there is an application for revocation of grant pending before court. He states that his siblings do not have any land to cultivate. He further states that the confirmation in the grant does not include plots number 763, 4775,053 and 054. He lastly stated that the administrator has never called the family to update them on what has been going on with the estate.

The respondents were represented by Mr. Eddie Njiru and Ms. Muthoni. They opposed the application arguing that it seeks to preserve an estate which was distributed and grant confirmed in 1993. He states that the applicant has no *locus standi* as he is not the administrator of the estate. He states that the applicant has already inherited his portion and can only complain about what he inherited but cannot interfere with what the other family members inherited. Mr. Njiru states that the other respondents are not strangers as some have rented the plot while others have bought them from the beneficiaries. He states that the 1st respondent is the widow of the late son of the deceased one Swaleh Kisaka and that plot 053 and 054 and KANGARI/NDAGARE/763 is the property of the 1st respondent's husband which was acquired *inter vivos* hence the reason why they were not included as part of the estate to be distributed. Plot number 759 was distributed to Swaleh Kasaga and Ali Kasaga. He also stated that the certificate of confirmation of grant has not been revoked. He also stated that there was no evidence that the estate was being wasted.

Ms. Muthoni stated that the 6th respondent bought 2 acres of KANGARE/NDAGARE/716 from the administrator and the 1st wife to the deceased who was trying to save the property from being sold by the bank in recovery of a debt.

The issues arising in this application are as follows:-

1. *Whether plot No. 759/11 Ndagani, plot number 053/053 (market stall) Chuka, plot number 054/054 (market stall) Chuka, Karingani/Ndagani/763, Karingani/ Ndagani/ 716 and Mwanjati/Mariani/4779 formed part of the deceased estate and whether they were distributed.*

2. *Whether the applicant has locus standi to bring this application. The record (Form 54 and Form P&A.5) shows that the deceased's property which was to be distributed included the following;*

- *Land No. Karingani/Ndagani/716*
- *Land No.Mwanjate/Mariani/727*
- *Land No.Mwajante/Mariani/3132*
- *Plot No. Gaturi/Githimu/T.117*
- *Plot No. Karingari/Ndagani/759*

- *Plot No. 56 Chuka*
- *Posho Mill in Pplot No. Karingari/Ndagani/759*
- *Kiosk in Chuka town*
- *Shares in Kenya commercial bank*
- *Motor vehicle KRG 812 which was later included in the grant through a court order issued on 14/12/94*

From the above list, Plot No. 053/053 (market stall) Chuka, Plot No. 054/054 (market stall) Chuka are not included as part of the deceased estate. Mwanjati/Mariani/4779 does also not form part of the deceased's property listed in form 54 and form P & A.5. The respondents have explained the status of those plots.

Counsel for the 1st respondent stated in the oral submissions that plot 053 and 054 and KANGARI/NDAGARE/763 are the property of the 1st respondent's husband (now deceased) were was the son to the deceased. These property was acquired intervivos by the late husband of the 1st respondent hence the reason why they were not part of the estate to be distributed. The applicant did not dispute this explanation.

The 6th respondent produced documents showing that he bought 2 acres out of KANGARE/NDAGARE/716. The remaining part was distributed under form 54

Summary of the property in dispute and their status

1. The 1st respondent also said Plot No. 763 belonged to her late husband and that it was not part of the deceased's estate. This could be the reason it was not distributed during confirmation of the grant.
2. **L.R. No. Ndagani 716** - was distributed and the 6th respondent produced evidence to show that he purchased 2 acres out of the parcel.
3. **Mwajati Manani 4749** does not appear in the list of properties distributed. Neither of the parties explained the status of this property.

It is not in dispute that the applicant is the son of the deceased and that he had been provided for in the distribution of the estate. He is the son the deceased's second wife who has five sons and eight (8) daughters. He said he left Kenya in 2011 to go to Doha and when he returned he found that his elder brother the son of the deceased by his first wife had filed this succession cause and the grant confirmed. On perusal of the record, I find that this cause was filed in 1993 before Embu Principal Magistrate court and taken over by the High Court in the year 2011 and given the current file number. At the time the cause went to the High Court, the grant had been confirmed. It was indeed confirmed in 1993 when the applicant was still in the country. Since 1993 the applicant has not explained what he was doing. The respondents case is that the estate was distributed as per the will of the deceased and that all family members were provided for.

The parcels of land he says were left out of the estate belong or are lawfully being used by the respondents with the permission of the beneficiaries. The same case applies to the plots he alleged that are being wasted and to which he seeks to preserve through an order of the court. Except the applicant, no other beneficiary is complaining.

The administrator of the estate has already distributed it to the beneficiaries. The estate having been distributed and taken over by the respective beneficiaries cannot be the subject of preservation by the succession court. Any dispute arising concerning property already distributed should be dealt with in the Environment and Land Court.

If there is any property that was left out during distribution, it is the responsibility of the administrator to seek inclusion and preservation if need be. The respondents have explained the status of the parcels mentioned that they are being used by them having inherited them in this cause and others having purchased them from the beneficiaries. Others are relatives of beneficiaries and are lawfully in occupation of the properties or using them as such.

The applicant admits that he is not the administrator and that the administrator is still alive. The administrator is the person authorized by the law to administer and preserve the estate of the deceased before distribution is done or is completed. The applicant in this case approaches the court as a son of the deceased. He has not been appointed in any legal capacity to administer the estate. This application comes 21 years since the grant was confirmed.

It is my finding that the applicant has no *locus standi* to bring this application and it is hereby struck out. Each party to meet their own costs. The applicant has been spared from paying costs to the respondents but this does not mean that there will be a repeat exercise if he continues to engage the court in vexatious litigation.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2014.

F. MUCHEMI

J U D G E

In the presence of:-

Applicant

Administrator

1st Respondent

6th Respondent

F. MUCHEMI

J U D G E